APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS
No. 81-1065

ELMO W. MCCLOUD, *Appellant,*

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), *Appellee.*

Appeal from the Superior Court
of the District of Columbia

(Hon. Paul F. McArdle, Motions Judge)

(Argued May 5, 1982 Decided May 13, 1982)

BEFORE: Kern, Pryor, and Belson, *Associate Judges.*

MEMORANDUM OPINION AND JUDGMENT

Appellant challenges the trial court's dismissal of his complaint which alleged that he was a victim of a discriminatory practice by his employer, appellee, made unlawful by the D.C. Human Rights Act, D.C. Code 1981, §§ 1-2501 *et seq.* He contends that he is not precluded from filing suit in the Superior Court after the Office of Human Rights has issued a no probable cause determination. We affirm.

I

Appellant was employed as an on-board service director for AMTRAK from March, 1973 to February, 1980. While serving in 1979 as a witness for the company in another suit, appellant discovered that he was hired at a salary that was substantially lower than that of the similarly situated white on-board service directors.

In January, 1980, appellant filed a complaint with the D.C. Office of Human Rights (OHR), alleging that he was the victim of an unlawful discriminatory practice relating to employment. On February 28, 1980, the OHR issued its determination that

there was no probable cause for the complaint. On March 14, 1980, appellant requested that the OHR waive its jurisdiction and permit the Equal Employment Opportunity Commission to investigate his complaint. On April 21, 1980, the OHR informed appellant that it would retain jurisdiction in the matter. Appellant then commenced a suit in the Superior Court and appellee filed a motion to dismiss the complaint, contending that (1) the court lacked jurisdiction since appellant had filed a complaint with the OHR and (2) the action was time-barred. Following a hearing, the trial court dismissed the action.

II

Appellant claims that he is entitled to file an independent suit in Superior Court even though he has already filed a complaint with the OHR. D.C. Code 1981, § 1-2556 provides:

> (a) Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of competent jurisdiction for damages and such other remedies as may be appropriate, unless such person has filed a complaint hereunder: Provided, that where the Office has dismissed such complaint on the grounds of administrative convenience, or where the complainant has withdrawn a complaint, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who maintains, in a court of competent jurisdiction, any action based upon an act which would be an unlawful discriminatory practice under this chapter may file the same complaint with the Office.

The jurisdiction of the Superior Court and the jurisdiction of the OHR are mutually exclusive. *Brown* v. *Capitol Hill Club*,, D.C.App., 425 A.2d 1309, 1311 (1981). Appellant failed to prove that he fell within one of the two exceptions outlined in D.C. Code 1981, § 1-2556—withdrawal of the complaint or dismissal of the complaint for administrative convenience. Appellant contends that he should have been permitted to maintain an action in Superior Court since he had asked the OHR to waive its jurisdiction before he was notified of the no

probable cause determination. Appellant, however, failed to raise this notice issue before the trial court and is consequently barred from raising the issue on appeal. Furthermore, he failed to withdraw his complaint from the OHR before the agency's disposition. *Brown* v. *Capitol Hill Club, supra* at 1312. Having filed his complaint with the OHR, appellant is thus precluded from bringing the same action in Superior Court. *Id.* at 1313. Therefore, the trial court did not err in dismissing his complaint. Accordingly, it is

ORDERED and ADJUDGED that the order on appeal be, and it hereby is, affirmed.

FOR THE COURT

/s/ RICHARD B. HOFFMAN

RICHARD B. HOFFMAN
Acting Clerk

Copies to:

Honorable Paul F. McArdle

Clerk, Superior Court

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APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81-1065

ELMO W. MCCLOUD, *Appellant*,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), *Appellee*.

BEFORE: Newman, Chief Judge; Kelly, Kern, Nebeker, Mack, Ferren, Pryor, and Belwon, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing en banc and it appearing that the majority of the judges of this Court has voted to deny the aforesaid petition, it is

ORDERED that appellant's petition for rehearing en banc is denied.

PER CURIAM

Chief Judge Newman and Associate Judges Mack and Ferren would grant appellant's petition for rehearing en banc.

Copies to:

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COUNCIL OF THE DISTRICT OF COLUMBIA

MEMORANDUM REPORT

District Building, 14th and E Streets, N.W. 20004 Fifth Floor 724-8000

To Councilmembers

From John A. Wilson, Chairperson, Committee on Public Services and Consumer Affairs

Date July 5, 1977

Subject Committee Report of Bill 2-179, "The Human Rights Act of 1977," introduced June 16, 1977 by Councilmembers D. Clarke, H. Mason, A. Dixon, M. Barry, W. Hardy, D. Moore, J. Moore, W. Rolark, P. Shackleton, W. Spaulding, J. Wilson, N. Winter and S. Tucker.

Pursuant to action taken at its meeting on July 5, 1977, the Committee on Public Services and Consumer Affairs to which was referred the bill, No. 2-179, to enact present Title 34 of the District of Columbia Rules and Regulations as the "Human Rights Act of 1977" recommends that the bill, with one technical amendment, which does not change the substance of the bill, be approved by the Council at the earliest possible date.

The single amendment recommended by the Committee repeals the present Title 34 on the effective date of the new act and makes the new act retroactive.

Introduction and Summary

Bill No. 2-179 makes no substantive changes in the text of present Title 34 of the D.C. Rules and Regulations, the "Human Rights Law." Its sole effect is to enact that law as a statute and thus make it a permanent part of the District of Columbia Code. Enactment would serve three basic purposes: (1) Removal of legal questions which have been raised as to certain provisions of Title 34 because of its present status as a police regulation issued by the pre-Home Rule city government; (2) reinforcement of the Council's view that the Human Rights Act is among our most important laws and is to be vigorously

enforced by all agencies and officials of the District Government; and (3) establishment of the proposition that licensing laws and other provisions of the District of Columbia Code are to be construed and enforced in such a manner as to give full effect to the Human Rights Act. The importance and noncontroversial character of these purposes is attested to by the fact that twelve of the thirteen Councilmembers have co-sponsored the present bill.

Purposes

(1) Present Title 34 of the D.C. Rules and Regulations was adopted pursuant to the pre-Home Rule Council's authority to adopt "reasonable and normal police regulations "pursuant to D.C. Code §§ 1-226 and 1-224a. The Committee has become aware that in several court cases serious questions have been raised concerning the power of the pre-Home Rule District Government to authorize some of the remedies contained in Title 34. Thus, in *Mendota Apartments* v. *District of Columbia Commission on Human Rights*, 314 A.2d 832, 835 (D.C. App. 1974) and again more recently in *Newsweek Magazine* v. *District of Columbia Commission on Human Rights*, ____ A.2d ____, ____, footnote 5 (D.C. App. 1977), the District of Columbia of Appeals pointedly noted that, "Whether a reasonable and usual police regulation may authorize an administrative body to award unliquidated damages is at the least doubtful." The Supreme Court's decision in *Alyeska Pipeline Service Company* v. *The Wilderness Society*, 421 U.S. 240 (1975), if followed by our local courts, also indicates a lack of power of the Commission on Human Rights or of our courts to award attorneys' fees to a successful complainant in the absence of express statutory authorization.

Questions such as these severely weaken the effectiveness of our Human Rights Law, particularly as regards its "private attorney general" enforcement by the victims of discrimination. If those questions are not effectively answered, the District of Columbia might thus find itself in the ironic position of

having a law which is widely hailed as the most comprehensive of its kind in the nation yet is lacking in enforcement mechanisms.

Enactment of Title 34 as the "Human Rights Act of 1977" under the present Council's broad legislative authority would resolve these questions and put our human rights law on a firm legal footing.

(2) Enactment of Title 34 would also affirmatively and forcefully convey to the executive and administrative agencies of the District Government the importance which the Council places on vigorous enforcement of its provisions. The Committee notes that concerned groups and citizens have criticized the Office of Human Rights, the Office of Corporation Counsel, and other D.C. agencies on this score.

Enactment of Bill No. 2-179 would also carry the message to all those covered by the Human Rights Law who have in the past given mere lip service to Title 34 that they must now affirmatively bring themselves in compliance with the new Human Rights Act.

(3) So long as our Human Rights Law is a mere police power regulation justified under the old Council's limited powers, its construction and enforcement in conjunction with District licensing laws and other D.C. Code provisions will remain uncertain. Commonly accepted rules of statutory construction provide that the interpretation and application of a regulation may not cover matters beyond the limits of its legislative source, see for example, *Hooper* v. *Mountain States Securities Corporation*, 282 F.2d 195, 202 (5 Cir. 1960), and that regulations enacted under a general power have no probative force in interpreting the applications and enforcement of a specific statute. See, for example, *United States* v. *Barnard*, 255 F.2d 583 (10 Cir. 1958). Such rules suggest that in cases of ambiguity or implied conflict between Title 34 and a statute, it is the former that must yield so long as it is a mere regulation.

Enactment of Title 34's provisions as the "Human Rights Act" would underscore the Council's intent that the elimina-

tion of discrimination within the District of Columbia should have "the highest priority" (compare *Newman* v. *Piggy Park Enterprises*, 390 U.S. 400, 402 (1968), and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) and that the Human Rights Act should therefore be read in harmony with and as supplementing other laws of the District. It would thus be made unequivocally clear, for example, that a licensed establishment which has been found to discriminate in violation of the Act, could have its license suspended, revoked, or otherwise restricted for that reason. See § 317 of the bill.

Amendment

The Committee has amended the bill to add a new Section 318 (and renumber present Section 318 as Section 319), to read as follows:

> "Sec. 318(a) 'A Regulation Governing Human Rights - Title 34,' enacted November 16, 1973 (Reg. No. 73-22) is hereby repealed: EXCEPT that any proceeding instituted under Regulation No. 73-22 or Article 40, 45, or 47 of the 'Police Regulations of the District of Columbia' or any violation thereof, which occurred prior to the effective date of this act, shall not be nullified by this act.
>
> (b) The procedures and remedies set forth in this act shall apply to any civil litigation or administrative proceeding pending on or instituted after the effective date of this act as a result of any act, omission or violation of Regulation No. 73-22, effective 11-16-73, Title 34, 'The Human Rights Law,' or of Article 40, 45, or 47 of the 'Police Regulations of the District of Columbia,' as they were before they were repealed by Regulation 73-22, November 17, 1973, which act, omission or violation occurred prior to the effective date of this act."

The amendment makes clear that the new "Human Rights Act of 1977," rather than the old police regulation which it supersedes, is to govern all administrative and court proceedings from the date it becomes effective.

Financial Impact of the Legislation

No additional cost will be entailed by the bill, since its sole purpose is to put the present police regulation on the firmer legal footing of a statute.

Conclusion

Since the noncontroversial purpose of the bill is to resolve legal questions which have been raised to the present Human Rights Law and to give that law the increased dignity and force of a statute, the Committee recommends that the Council pass the bill as quickly as possible.

Executive and District of Columbia Agency Comments

Comments from the Mayor's Office have not been received. The Office of Human Rights and the D.C. Commission on Human Rights participated in phrasing the language of Section 318.

Committee Vote - July 5, 1977

Mrs. Hardy - absent
Mrs. Shackelton - in favor
Mr. Spaulding - in favor
Mr. Wilson - in favor